

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

AXIALL CORPORATION and
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.; ALLIANZ
GLOBAL RISKS US INSURANCE COMPANY;
ACE AMERICAN INSURANCE COMPANY;
ZURICH AMERICAN INSURANCE COMPANY;
GREAT LAKES INSURANCE SE; XL
INSURANCE AMERICA, INC.; GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA; ASPEN INSURANCE UK LIMITED;
NAVIGATORS MANAGEMENT
COMPANY, INC.; IRONSHORE SPECIALTY
INSURANCE COMPANY; VALIDUS
SPECIALTY UNDERWRITING SERVICES,
INC.; and HDI-GERLING AMERICA
INSURANCE COMPANY,

Defendants.

Civil Action No. 19-C-59

**Presiding Judge Christopher C.
Wilkes**

**Discovery Commissioner Judge
Russell M. Clawges, Jr.**

ORDER GRANTING PLAINTIFFS' FOURTH MOTION TO COMPEL

This matter came before the Court this 14th day of September 2021. The Plaintiffs Axiall Corporation ("Axiall") and Westlake Chemical Corporation (collectively, "Westlake"), by counsel, have filed Plaintiffs' Fourth Motion to Compel the production of a response to Plaintiffs' Supplemental Interrogatory and Request for Production of Documents Directed to Defendant HDI-Gerling America Insurance Company, responsive documents, and a witness to testify in response to the additional topics noticed in Plaintiffs' Amended Rule 30(b)(7) Notice of Deposition Directed to HDI-Gerling America Insurance Company Regarding Natrium Tank Rupture Insurance Claim Subjects. Westlake and the Insurers have fully briefed the issues

necessary, and a hearing was held before the Discovery Commissioner on September 14, 2021.

So upon full consideration of the issues, the record, and the pertinent legal authorities, the

Discovery Commissioner enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This litigation arises out of the Insurers' refusal to provide coverage to Westlake under "all-risk" commercial property insurance policies that they issued to Axiall (which was later acquired by Westlake) insuring against "All Risks of Direct physical loss or damage . . . except as hereinafter excluded" with a Period of Insurance of November 19, 2015 to November 19, 2016 (hereinafter, the "Policies"). *See* Plaintiffs' Brief at 1, 6.

2. On August 27, 2016, a railroad tank car containing pressurized liquid chlorine ruptured at the Plant (hereinafter, the "Release"), releasing a large chlorine gas cloud that moved across the Plant, allegedly causing or resulting in direct physical loss or damage to property at the Plant insured under the Policies. *See* Plaintiffs' Brief at 5.

3. Covestro, LLC ("Covestro") owns and operates a plant directly adjacent to the Natrium plant, southeast and downwind along the Ohio River valley. *See* Plaintiffs' Brief at 5.

4. The chlorine gas cloud created by the Release traveled to the Covestro plant. Covestro alleged this cloud damaged the plant's stainless steel piping and tanks and caused corrosion to a variety of other equipment. This is similar to the type of damage that Westlake allegedly experienced from the same Release. *See* Plaintiffs' Brief at 5-6.

5. Westlake underwent a lengthy investigation process with HDI and the other Defendant Insurers, which resulted in HDI and the Defendant Insurers denying Westlake's claim for coverage and preemptively filing a declaratory judgment action against Westlake. *See* Plaintiffs' Brief at 7-8.

6. Both Westlake and Covestro were insured by HDI-Gerling America Insurance Company n/k/a HDI Global Insurance Company (“HDI”) during the time period of the Release. Westlake and Covestro’s HDI policies, each, respectively, were all-risk policies with “corrosion,” “faulty workmanship,” and “contamination” exclusions. *See* Plaintiffs’ Brief at 6.

7. Covestro entered into a \$3.5 million settlement with HDI for damage Covestro allegedly experienced as a result of the Release. *See* Plaintiffs’ Brief at 6-7.

8. Westlake served discovery on HDI regarding its coverage of the Covestro claim. Specifically on June 7, 2021, Westlake served HDI supplemental discovery requests containing one interrogatory and one request for production, both solely concerning HDI’s handling of Covestro’s claim. On June 9, 2021, Westlake noticed HDI for an additional five deposition topics, each limited to HDI’s coverage of any claims relating to the Release, including coverage of Covestro’s claims. *See* Plaintiffs’ Brief at 9.

9. In response, on July 7, 2021, HDI objected to the discovery requests. It declined to provide any substantive answer to Westlake’s interrogatory or any documents responsive to its request. On July 15, 2021, HDI also objected to Westlake’s Amended Deposition notice, again claiming that Westlake was seeking confidential, irrelevant information. HDI alleged that Westlake was seeking Covestro’s confidential coverage information, despite the fact that Covestro provided this coverage information to Westlake in the Underlying Litigation. *See* Plaintiffs’ Brief at 9-10.

10. The Parties met-and-conferred telephonically on July 26, 2021, but were unable to resolve HDI’s objections. *See* Plaintiffs’ Brief at 10.

11. Westlake has asked Covestro if it has any objection to HDI providing to Westlake a copy of the claim file that HDI maintained for the Covestro property loss claim arising out of

the Release, and Westlake received a response from Covestro's counsel that Covestro takes no position in this matter. Westlake previously received information regarding Covestro's settlement with HDI directly from Covestro. *See* Plaintiffs' Brief at 10.

12. The Discovery Commissioner finds this issue ripe for decision.

CONCLUSIONS OF LAW

"As a general rule, the scope of discovery under Rule 26 of the West Virginia Rules of Civil Procedure is quite broad and encompasses 'any matter, not privileged, which is relevant to the subject matter involved in the pending action.'" *State ex rel. Jaguar Land Rover Ltd. v. King*, No. 19-0222, 2019 WL 5681486, at *4 (W. Va. Nov. 1, 2019) (quoting W. Va. R. Civ. P. 26(b)(1)); Feb. 10, 2021 Order at 3 ("Generally speaking, the discovery process allows litigants to obtain materials that are critical to the proof of their case. As such, materials that are relevant and probative to the asserted claim, or any defense thereto, usually are discoverable."). Discovery is not limited to admissible evidence, it also "applies to information reasonably calculated to lead to the discovery of admissible evidence." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 785 S.E.2d 257, 264 (W. Va. 2016).

The court should only limit discovery if it finds the requests "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." W. Va. R. Civ. P. 26(b)(1)(C) ("Rule 26"). This language is similar to the Federal Rules of Civil Procedure, and, historically, West Virginia courts have found federal case law persuasive when assessing whether discovery is "burdensome or oppressive." *Truman v. Farmers & Merchs. Bank*, 375 S.E.2d 765, 768 (W. Va. 1988).

When a court reviews a party's claim that the discovery sought is burdensome or oppressive in nature, the court must consider several factors: (1) the requesting party's need to obtain the information versus the burden placed on the producing party; (2) whether the opposing party has adequately demonstrated why the discovery is a burden (unless the discovery request is oppressive on its face); and (3) the relevancy and materiality of the information sought by the requesting party. *State Farm Mut. Auto Ins. Co. v. Stephens*, 425 S.E.2d 577, 583 (W. Va. 1992).

Westlake seeks to compel Insurer HDI to respond to Plaintiffs' Supplemental Interrogatory and Request for Production of Documents Directed to Defendant HDI-Gerling America Insurance Company, produce responsive documents, and present a witness to testify in response to the additional topics noticed in Plaintiffs' Amended Rule 30(b)(7) Notice of Deposition Directed to HDI-Gerling America Insurance Company Regarding Natrium Tank Rupture Insurance Claim Subjects. *See generally* Plaintiffs' Brief.

First, the information Westlake seeks is relevant to the claims at issue in this case or may be reasonably calculated to lead to the discovery of relevant evidence. Covestro allegedly experienced damage similar to the damage that Westlake has alleged, both as a result of the Release. Further, both Covestro and Westlake were insured by HDI under policies that allegedly contain similar exclusions. HDI settled Covestro's claim but denied Westlake's claim for coverage of similar damages. The evidence that Westlake seeks regarding Covestro's claim is reasonably calculated to lead to the discovery of admissible evidence, including: the interpretation of Westlake's policy; HDI's claims handling procedures, whether HDI consistently applied claims handling standards in good faith to Westlake's claim, or whether it acted in bad

faith; and identification and valuation of property damage. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 785 S.E.2d 257, 264 (W. Va. 2016).

Second, HDI has not demonstrated that the requested discovery is unduly burdensome. HDI previously testified that it maintains electronic claims files that are accessible with a simple search. With this search, it can produce information responsive to Plaintiffs' Supplemental Interrogatory and Request for Production of Documents Directed to Defendant HDI-Gerling America Insurance Company. Further, the additional topics noticed by Westlake in Amended Rule 30(b)(7) Notice of Deposition Directed to HDI-Gerling America Insurance Company Regarding Natrium Tank Rupture Insurance Claim Subjects are appropriately narrow and tailored to testimony regarding HDI's settlement with Covestro. This discovery will not present an undue burden to HDI, which is a sophisticated party.

Finally, with respect to any confidentiality concerns regarding Covestro, the Court notes that Covestro already provided certain information about HDI's handling of Covestro's claim directly to Westlake in the separate litigation between the two parties. Moreover, in connection with these discovery requests, Westlake asked Covestro if it has any objection to HDI providing a copy of its Covestro claim file to Westlake, and Covestro responded to Westlake that it took no position on the matter, indicating no objection to Westlake's motion. Thus, Covestro has not demonstrated any opposition to Westlake learning about its coverage claim to HDI. Given that Covestro initially provided Westlake with information regarding its settlement with HDI, and that HDI has not demonstrated with appropriate specificity what confidential information is protected from disclosure, Covestro's consent is not necessary for the requested discovery to be produced to Westlake.

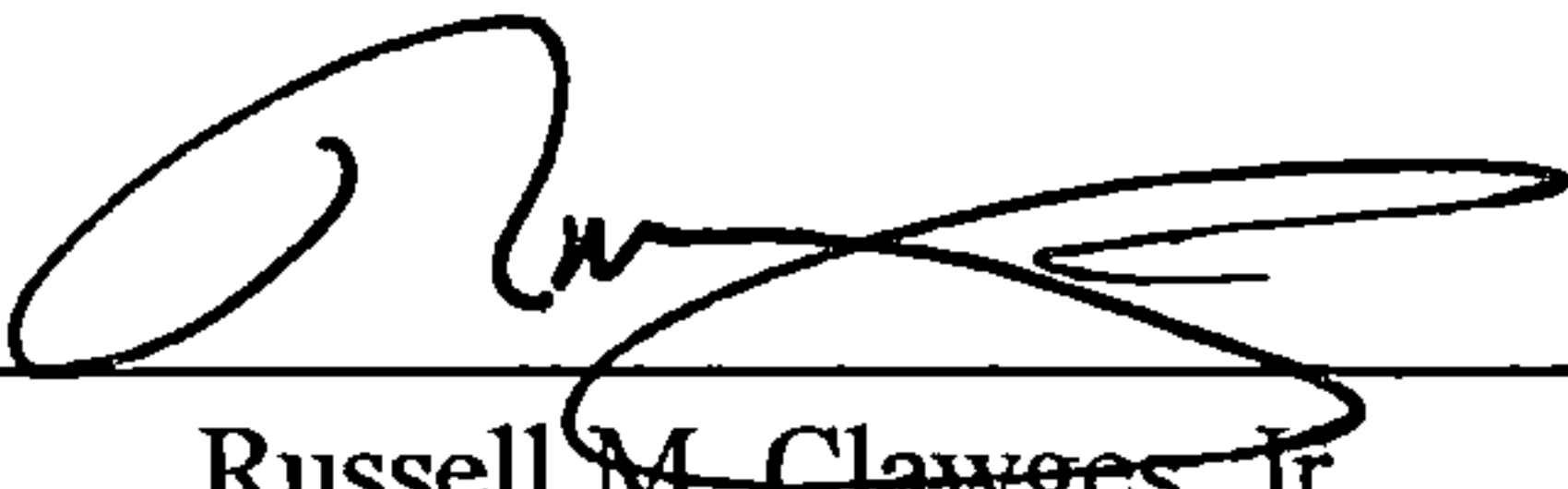
CONCLUSION

Upon consideration of Plaintiffs' Fourth Motion to Compel Discovery, and the briefs and arguments in support thereof and in opposition thereto, the Discovery Commissioner hereby **ORDERS** that the Insurers produce to Westlake within thirty (30) days of entry of this Order , a response to Plaintiffs' Supplemental Interrogatory and Request for Production of Documents Directed to Defendant HDI-Gerling America Insurance Company, responsive documents along with a privilege log demonstrating any documents redacted or withheld from production, and a witness to testify in response to the additional topics noticed in Plaintiffs' Amended Rule 30(b)(7) Notice of Deposition Directed to HDI-Gerling America Insurance Company Regarding Natrium Tank Rupture Insurance Claim Subjects.

IT IS SO ORDERED:

The clerk is directed to send a copy of this Order to counsel of record.

ENTER: Sept 17, 2021



Russell M. Clawges, Jr.
Discovery Commissioner